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IN THE

Supreme Court of the United States

October Term, 1918. No. 637. (26,723).

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

WILBUR H. MOHNEY,

Respondent.

ON CERTIORARI TO THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

BRIEF FOR PETITIONERS.

STATEMENT OF THE CASE.

The respondent, Wilbur H. Mohney, commenced this action in the Common Pleas Court of Lucas County, Ohio, for damages, complaining

> "that on or about March 29, 1916, he was an employee of the defendant, one of its locomo-

tive firemen; that in the early morning of the said day *he was riding as a passenger upon one of the defendant's passenger trains,* on transportation issued to him by defendant carrying him as a passenger from Toledo to Cleveland, Ohio, and on a train which on said morning was running in two sections, the plaintiff being seated in the rear coach of the first section of said train out of Toledo for Cleveland."

* * * * *

"the engineer of the second section of said train was grossly negligent and careless in that he did not *look for, see or observe* the danger signals which were displayed along the line far in the rear of the train of which plaintiff was riding and which showed that the track ahead of the second section was not clear and that to proceed along the said track would result in a collision."

* * * * *

"the said engineer of said second section, with gross carelessness, ran his train"

* * * * *

"Plaintiff further states that the said defendant, so acting through its engineer and servant, was grossly negligent and careless in the operation of the said second section which was following the first section on which plaintiff was riding."

Defendant's answer admits certain formal parts of the petition and

"admits that on said day, he was riding as a passenger upon one of the defendant's passenger trains on transportation issued to him by the defendant company, and that at said time, plaintiff was riding on a train running in two sections, and that the plaintiff was, at said time, oc-

cupying a seat in the rear coach of the first section of said train;"

* * * * *

"the second section of said train collided with the train on which plaintiff was riding, and that as a result of said collision, plaintiff sustained injuries."

But defendant denies that the engineer did not look for, see or observe the alleged danger signals as pleaded in the petition, as follows:

"And for a second defense, defendant alleges that, at the time of the injuries complained of in said petition, plaintiff herein was a passenger on defendant's train, riding on a free pass, issued by defendant and good between Collinwood, Ohio, and Air Line Junction, Ohio; that plaintiff was at said time on an interstate journey, from the City of Toledo, Ohio, to the City of Pittsburgh, Pennsylvania; that while using said pass on said 29th day of March, 1916, plaintiff was traveling on matters wholly personal, and in no manner connected with his employment with the defendant company; that said pass on which said plaintiff was riding as a passenger, was issued to the plaintiff gratuitously under the provisions of a statute of the United States, known as the Hepburn Act of June 29th, 1906, (Federal Stat. Ann. 1909, Supp. 255); one of the conditions endorsed on said pass, and agreed to by the plaintiff herein was the following:

'In consideration of receiving this free pass each of the persons named thereon, using the same, voluntarily assumes all risk of accidents and expressly agrees that the Company shall

not be liable under any circumstances, whether of negligence of itself, its agent, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the Company as a common carrier, or liable to him or her as such.' "

At the trial of said cause the only witness called was the respondent, *Wilbur H. Mohney,* who testified in chief, among other things:

"Q. On that morning you were going to the City of Cleveland, were you? A. Yes.

Q. And were you going beyond the City of Cleveland? A. Yes, sir.

Q. From the City of Cleveland, what other city were you bound for? A. Pittsburgh.

Q. What was your route? A. By the way of Youngstown over the Erie from Cleveland, and the P. & L. E. from there to Pittsburgh."

* * * * *

"Q. Now what happened as you were in the rear coach of First 86, on your way to Cleveland, that morning? A. You will have to ask somebody that knows; I was asleep."

And on cross examination:

"Q. You had received, at the ticket office here, a trip pass for yourself and wife from Toledo, by way of Ashtabula and Youngstown? A. Yes, sir.

Q. Then I understand there was left, at your request, a pass on the P. & L. E. for yourself and wife, with the ticket agent at Youngstown? A. Yes, sir."

The face of the pass (Pg. 17) read as follows:

"NEW YORK CENTRAL RAILROAD COMPANY
1916 West of Buffalo D O 944
Pass W. H. Mohney—
Account Engineer,
Between Collinwood—Air Line Jct.
Toledo Division
Until December 31, 1916. (Unless otherwise ordered *and subject to conditions on back.*)
Valid when countersigned by W. F. Schaff or J. H. Turner.
Countersigned D. C. MOON
J. H. TURNER *General Manager.*"

Certain facts were stipulated, to-wit:

1. "That the plaintiff was, on March 29th, 1916, and for some time prior thereto, in the employ of the defendant as a locomotive fireman, who had been promoted to an engineer, but had not yet been assigned to an engineer's run.

2. That New York Central employe's pass No. D O 944, good between Collinwood, Ohio, and Air Line Junction, Ohio, which is marked Exhibit 1, and is attached to this bill of exceptions and made a part hereof, was issued to the plaintiff by the defendant company.

3. That The New York Central Company was, on March 29th, 1917, and for some time prior thereto, an interstate railroad company, owning and operating a line of railroad from the City of Chicago, State of Illinois, to the City of New York in the State of New York.

4. That on the early morning of March 29th, 1916, the plaintiff boarded what is known as train "First 86" at Toledo.

5. That the plaintiff presented his employe's

annual pass, Exhibit 1, to the conductor of said train for transportation for Toledo to Cleveland.

6. That the passenger train upon which the plaintiff was riding on said 29th day of March, 1916, was, with the exception of the mail car thereon, a train containing cars from the City of Detroit, Michigan, and the City of Toledo, Ohio, through to the City of Pittsburgh, Pennsylvania.

That said train ran over the line of The New York Central Railroad Company to Cleveland, and over the line of The Erie Railroad Company from Cleveland to Youngstown, both in the State of Ohio, and from Youngstown to Pittsburg over the line of the Pittsburgh & Lake Erie Railroad.

7. That at the request of the plaintiff, a trip pass in favor of the plaintiff and his wife was secured by the defendant company, and left with the agent of the defendant company at the station in Youngstown, Ohio, providing transportation for the plaintiff and his wife from Youngstown, Ohio, to Pittsburg, Pennsylvania, over the line of the Pittsburg & Lake Erie Railroad Company.

8. That a trip pass was, at the request of the plaintiff's wife, issued by the defendant company, providing for the transportation of the plaintiff and his wife between the City of Toledo and the City of Youngstown.

9. That while on said train between the cities of Toledo and Cleveland, the car in which the plaintiff was riding was wrecked, and as a result thereof the plaintiff sustained certain injuries.

10. The following language appears on the back of said pass D O 944, Exhibit 1 herein:

Not good on Main Line 6, 19, 22, 25 or 26; or 21 and 43 on Toledo Division.

CONDITIONS.

In consideration of receiving this *free* pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury, to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the company as a common carrier, or liable to him or her as such.

And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving *free transportation*, and that the pass will be lawfully used.

If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.

I agree to the above conditions.

(*Signed*) W. H. MOHNEY,

To be signed in ink."

and it is admitted that the handwriting thereon is the signature of the plaintiff herein.

11. That the plaintiff is one of the parties designated in the so-called "Hepburn Act" of June 29th, 1906, as one to whom a pass may issue, as well as designated in the statutes of Ohio relative to the subject of the issuance of passes to railroad employes."

"It is hereby stipulated and agreed by and between the parties hereto, Wilbur H. Mohney, plaintiff, and The New York Central Railroad Company, defendant, that D. C. Moon, if called as a witness in this cause, would testify as follows:

1. That on March 29, 1916, and for some time prior thereto, he was general manager of The New York Central Railroad Company, defendant herein, with headquarters and offices at the City of Cleveland, Ohio, and had general supervision and control over all lines of the defendant's railroad, extending between the cities of Cleveland, Ohio, and Toledo, Ohio, and that he, the said D. C. Moon, continued in said capacity for many months after said March 29, 1916.

2. That the wreck occurring on the defendant's line near Amherst, Ohio, on or about March 29, 1916, in which the plaintiff received some injuries, was due to the fact that the engineman of the second section of defendant's train No. 86 disregarded the caution signal about 8,000 feet and the stop signal about 3,000 feet in the rear of the first section of defendant's train No. 86.

It is further stipulated that the foregoing statements of the said D. C. Moon, general manager of the defendant company as aforesaid, are hereby agreed upon in lieu of the plaintiff's taking the deposition of the said D. C. Moon, and that the said statements shall be admissible in evidence on the trial of this cause, on introduction by either party hereto, subject only to the objections based upon the materiality or relevancy of said statements to the issues in this action."

The Court of Common Pleas rendered judgment for Mohney and overruled defendant's motion for a new trial.

Proceedings in error were instituted in the Court of Appeals, which affirmed the judgment of the Common Pleas Court. The opinion of the Court of Appeals in full may be found at page 39 of this brief.

The Supreme Court of Ohio denied your petitioner's motion for an order requiring said Court of Appeals to certify its record, duly filed in that court, and its petition in error duly filed in the Supreme Court of Ohio was denied and dismissed.

SPECIFICATION OF ERRORS.

The judgment of the Court of Appeals of Lucas County, Ohio, was in derogation of, and against the petitioner's title, right, privilege and immunity claimed under the Constitution and Statutes of the United States, especially set up and claimed by petitioner, to-wit:

(1) The testimony of the respondent clearly showed that he was upon an interstate journey, that he was traveling upon a pass, and that the conditions were set forth thereon as above quoted, and that the signature thereon was that of respondent.

(2) The judgment in the trial court should have been rendered for petitioner.

(3) The motion of petitioner for a new trial should have been granted for the causes therein set forth.

(4) A petition in error was duly filed in the Court of Appeals alleging the errors complained of; the Court of Appeals found that "the stipulation and the testimony * * * showed conclusively that Mohney at the time of his injury, was upon an intersate journey," but affirmed the judgment of the Court of Common Pleas.

(5) The court failed to apply the federal rule with reference to the liability of the defendant in error, while traveling on such pass.

(6) Said judgment is repugnant to, and in conflict with, the laws of the United States, and especially the Act of Congress of the United States, approved February 4, 1887, and the acts amendatory thereof, known as the Interstate Commerce laws.

(7) Said judgment is repugnant to, and in conflict with the *Constitution of the United States,* and especially *Article* 1, *Section* 8, Clauses 3 and 18 thereof, to-wit:

> "The Congress shall have power * * *
> Clause 3. To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.
> Clause 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers

vested by the Constitution in the government of the United States, or in any department or offices thereof."

(8) Said judgment is repugnant to, and in conflict with Federal legislation and the common law rules as accepted and applied, in Federal tribunals.

(9) Said judgment is repugnant to, and in conflict with the Constitution, to-wit:

Amendments, Article V:

"* * * Nor shall any person * * * be deprived of life, liberty, or property, without due process of law."

Article XIV:

"* * * Nor shall any state deprive any person of life, liberty, or property, without due process of law."

BRIEF OF ARGUMENT.

The Contract of Carriage Was Interstate.

Respondent boarded a train at Toledo (Page 3*) in the State of Ohio, intending to go, and being bound for Pittsburg, (Page 12) in the State of Pennsylvania, (Page 16).

He was traveling upon an employee's annual pass, having presented same to the conductor of the train (Page 10). A trip pass had been issued to defendant and his wife for transportation from Toledo, Ohio, to

* The references in this brief will be to the transcript of record.

Youngstown, Ohio, and at respondent's request, a trip pass for the transportation of respondent and his wife from Youngstown, in the State of Ohio, to Pittsburgh, in the State of Pennsylvania, had been issued by petitioner, and left with the petitioner's agent at the station in Youngstown for respondent. (Page 10.)

Therefore, it is clearly evident that the respondent had been furnished with transportation for an interstate journey, and that when he boarded the train at Toledo, he had started upon an interstate trip and was then being transported by a common carrier engaged in the transportation of passengers from a place in one state to a point in another state.

Railroad Company v. Sabine Tram Company, 227 U. S., 111.

Syl. "Shipments of lumber on local bills of lading from one point in a state to another point in the same state destined from the beginning for export, under the circumstances of this case, are foreign and not intrastate commerce."

"It is the nature of the traffic and not its accidents which determine whether it is intrastate or foreign."

Pgs. 126-127. "That it is the nature of the traffic and not its accidents which determines its character is illustrated by *Ohio Railroad Commission v. Worthington,* supra. A rate of 70 cents a ton was imposed by the Commission on what was called 'Lake-cargo coal' from a coal field in Eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie for carriage thence by lake vessels. The shipper transported

the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron, and it appeared that the coal might be accumulated in large quantities at Huron and only taken out of the accumulated lots from time to time for the purpose of shipping out of the state. The rate of 70 cents, however, covered not only the transportation of the coal to Huron, but placing it on the vessels and trimming it for its interstate journey. It was held that its transportation to Huron was an interstate carriage."

Baer Bros. v. Railroad, 233 U. S., 479.

Pg. 490. "But while there was no through-rate and no through-route there was in fact, a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation."

Railway v. Louisiana R. R. Commission, 236 U. S., 157.

Pg. 163. "When freight actually starts in the course of transportation from one state to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

McFadden vs. Railway, 241 Fed. Rep., 562.

Pgs. 565-566. "Whether commerce is interstate or intrastate must be determined by its essential character and not by mere billing or forms of contract. * * * Goods actually destined for points beyond the state of origin are necessarily in interstate commerce when they are delivered to the carrier and start in the course of transportation to another state. * * * This is true whether the goods are shipped on through bills of lading or on intial bills only to a terminal within the same state, where they are transhipped and thereafter transported on new bills of lading to a destination beyond the state."

Ohio R. R. Commission v. Worthington, 225 U. S., 101.

Pgs. 108-109. "By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the Commission which is in controversy here is applicable alone to coal which is thus from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage."

Terminal Co. v. Interstate Commerce Commission, 219 U. S., 498.

Pg. 527. "It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway, they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe v. Errol,* 116 U. S., 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another state, or delivered to a carrier for transportation.' "

The Court of Appeals found that respondent, at the time of his injury, was traveling upon an interstate journey. The journey being interstate, rights and liabilities thereunder are governed by the Federal laws exclusively. *Constitution of the United States,* Article I, Sec. 8, Clauses 3 and 18:

"The Congress shall have power * * *

Clause 3. To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.

Clause 18. To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or offices thereof."

Railway v. Rankin, 241 U. S., 319.

Pg. 326. "The state courts, treating the bill of lading as properly in evidence, undertook to determine its validity and effect. We need not, therefore, consider the mooted questions of pleading. The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill of lading and common law rules as accepted and applied in Federal tribunals. *Cleveland & St. Louis Ry. v. Dettlebach,* 239 U. S., 588; *Southern Express Co. v. Byers,* 240 U. S., 612, and cases cited; *Southern Ry. v. Prescott,* 240 U. S., 632.

Railway v. Searle, 229 U. S., 156.

Pg. 158. "If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the National Constitution. *Second Employer's Liability Cases,* 223 U. S., 1, 53; *Michigan Central Railroad Co. v. Vreeland,* supra."

Turnan et al v. Railway, 105 So. Car., 287.

Pg. 289. "In the instant case, the Federal law must control, for the contract of carriage was interstate, and was dependent upon the Act of Congress regulating passes for employees' families."

Prigg v. Pennsylvania, 16 Pet., 539.

Pg. 617. "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and,

as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

Railway v. Prescott, 240 U. S., 632.

Pgs. 639-640. "As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions. And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law."

Under the *Interstate Commerce Law,* the railroad can lawfully issue passes to certain classes of persons only. Sec. 1 (*U. S. Compiled Statutes,* Sec. 8563).

"The provisions of this Act shall apply to any corporation or persons * * * * engaged in the transportation of passengers or property wholly by railroad * * * from one state or territory of the United States * * to any other state or territory of the United States, * * *"

"No common carrier subject to the provisions of this act shall * * * directly or

indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law * * *."

Sec. 22 (U. S. Compiled Statutes, Sec. 8595).

"* * * Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees. * * *."

A pass issued by a railroad for interstate transportation to an employee must be deemed gratuitous in view of the prohibitions in Section 2 of the *Interstate Commerce Law,* (U. S. Compiled Statutes, Sec. 8564):

Sec. 2. "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

THE PASS WAS GRATUITOUS

Respondent was an employee of the petitioner, a common carrier (Page 10), as a locomotive fireman who had been promoted to be a locomotive engineer. Therefore he was a person to whom a free pass could be issued in conformity with the law. He had so admitted in writing when he signed the pass, which he presented at the commencement of his journey. (Page 11), and in the same agreement he stated that the pass would be lawfully used. He could not have lawfully used the pass, except as a free pass. There is no proof of any tariff of the carrier authorizing the use of the pass not as a free pass, or for any purpose. Either it was a free pass, or he was a trespasser.

Under the law, the carrier can lawfully issue passes to certain classes of persons only: *Interstate Commerce Law,* Sec. 1, (U. S. Compiled Statutes, Sec. 8563):

> "The provisions of this Act shall apply to any corporation or persons * * * engaged in the transportation of passengers or property wholly by railroad * * * from one state or territory of the United States * * to any other state or territory of the United States, * * *"
>
> "No common carrier subject to the provisions of this act shall * * * directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law * * *."

Sec. 22 (U. S. Compiled Statutes, Sec. 8595).

"* * * Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees * * *."

In view of the prohibitions of the law, a pass issued to an employe must be deemed to be gratuitous.

Interstate Commerce Law, Sec. 2, (U. S. Compiled Statutes, Sec. 8564:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Sec. 6 (U. S. Compiled Statutes, Sec. 8569).

"No carrier, unless otherwise provided by this Act, shall engage or participate in the trans-

portation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property ,or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Railway v. Rankin, 241 U. S., 319.

Pg. 327. "It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to

the maximum, *omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.'* "

Railway v. Maxwell, 239 U. S., 94.

"Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it."

Railway v. Thompson, 234 U. S., 576, infra.

Page 577: "The main question is whether when the statute permits the issue of a 'free pass' to its employees and their families it means what it says. * * * We think it plain that the statute contemplates the pass as gratuitous."

The majority of the Court of Appeals of Lucas County, Ohio, found that the pass was issued to respondent in part consideration for his services. The dissenting view was based on the Thompson case.

Validity of the Stipulations of the Pass.

A carrier may validly stipulate that it shall not be liable for injuries to the person to whom the pass is issued.

Railroad vs. Thompson, 234 U. S., 576:

Pgs. 576-7. "The plaintiff, Lizzie Thompson, sued the Railroad Company, the plaintiff in error, to recover for personal injuries inflicted upon her while she was a passenger upon a train that was carrying her from South Carolina

to Georgia. The railroad pleaded that she was traveling on a free pass that exempted the company from liability, the same having been issued to her gratuitously under the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, Sec. 1, as wife of an employee. This plea was struck out subject to the defendant's exception. The defendant also asked for an instruction that if the plaintiff was traveling on a free pass providing that the railroad should not be liable for negligent injury to her person she could not recover."

Pgs. 577-8. "The main question is whether when the statute permits the issue of a 'free pass' to its employees and their families it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by Sec. 6 it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception we think it plain that the statute contemplates the pass as gratuitous in the same sense to all. It follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the

pass but on the contrary contemplated the pass as being what it called itself, free.

As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this court. *Northern Pacific Ry. Co. v. Adams*, 192 U. S., 440. *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S., 442."

Boering v. Railway, 193 U. S., 442.

Pg. 448. "This was an action brought in the Supreme Court of the District of Columbia to recover damages for personal injuries sustained by Mrs. Boering while riding in one of the coaches of the defendant, and caused, as alleged, by the negligence of the company.

"A trial before the court and a jury resulted in a verdict and judgment for the defendant, which was affirmed by the Court of Appeals of the District, 20 D. C. App., 500, and thereupon the case was brought here on error."

Page 450. "Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. *Squire v. New York Central Railroad*, 98 Massachusetts, 239; *Hull v. Boston, Hoosac Tunnel & Western Railroad*, 144 Massachusetts, 284; *Boston & Maine Railroad v. Chipman*, 146 Massachusetts, 107."

"So in *Muldoon v. Seattle City Railway Company*, 10 Washington, 311, 313:

" 'We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose. This is an entirely different case

from that where a carrier attempts to impose conditions upon a passenger for hire, which must, if unusual, be brought to his notice. In these cases of free passage, the carrier has a right to impose any conditions it sees fit as to time, trains, baggage, connections, and, as we have held, damages for negligence; and the recipient of such favors ought at least to take the trouble to look on both sides of the paper before he attempts to use them.'

"See also *Griswold v. New York, &c., Railroad Company*, 53 Connecticut, 371; *Illinois Central Railroad Company v. Read*, 37 Illinois, 484, 510. As was well observed by Circuit Judge Putnam in *Duncan v. Maine Central Railroad Company*, 113 Fed. Rep., 508, 514, in words quoted with approval by the Court of Appeals in this case:

" 'The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted.'

"We see no error in the record, and the judgment of the Court of Appeals is affirmed."

In view of the foregoing authorities, the record discloses a case in which no liability could properly be imposed upon the petitioner.

Opinion of Court of Appeals of Lucas County, Ohio.

The opinion of the Court of Appeals of Lucas County, Ohio, is set forth in full at page 39 of this brief. In the opinion, the Court of Appeals states:

> "This court is unanimously of the opinion that the finding of the Court of Common Pleas, that the accident in this case was the result of gross negligence on the part of the railroad company, is abundantly sustained by the evidence before the trial court. The trial judge evidently gave full credit to the testimony which it was stipulated the General Manager of the Railroad Company would give if called as a witness and by virtue of the language of that stipulation, we think the trial court might well have characterized the negligence involved in stronger terms. In fact, we are clearly of the opinion that the negligence in this case, under the evidence, was willful and wanton.
>
> "We think the decisions throughout the country, state as well as federal, are practically unanimous to the effect that a contract relieving the railroad company from the results of negligence of the character which I have mentioned, are clearly against public policy and void."

The Appellate Court's opinion was the first intimation to the parties that the conduct of the carrier was "under the evidence," willful and wanton. It was not so pleaded. Apparently the court itself felt that, in order to bolster up its finding, there was need of a suggestion of an apparent showing of negligence by evidence, which it styled "of the character I have mentioned," to support it. The lack of this evidence is stated above. "Obviously this is a slender thread on which to hang a grave * * * argument."

No Evidence of Willfulness and Wantonness.

The only testimony in the record upon the subject is the stipulation that if D. C. Moon were called as a witness, that he would testify "that the engineman of the second section * * * disregarded the caution signal about 8,000 feet and the stop signal about 3,000 feet in the rear of the first section * * *."

The respondent testified:

> "Now what happened as you were in the rear coach of First 86, on your way to Cleveland, that morning?"
>
> "You will have to ask somebody that knows; I was asleep."

When the stipulation used the word "disregard," it should be taken in the ordinary meaning of the word. The Century dictionary defines "disregard," "V. T. To omit to regard or take notice of; overlook, specifically to treat as unworthy of regard or notice." The same authority defines "regard" as "To look upon; observe; notice with particularity; pay attention to."

It is pleaded that the "signals were at said time, covered by a sheet of fog, so that they could not, and were not observed by the engineer."

Suppose to make the meaning more clear, we substitute for the word "disregard" its synonyms. The words of the stipulation (page 18) would then read:

> "That the wreck * * * was due to the fact that the engineman * * * "overlooked, did not observe, did not notice with particularity," the caution signal * * * and the stop signal * * *."

When, owing to a sheet of fog so dense that the locomotive engineer did not observe the signals, the engineer is said to disregard the signals, i. e., omit to regard, overlook them, not look upon them, or observe them, he is not guilty of wanton or willful negligence.

Willfulness and wantonness was neither pleaded by plaintiff below, nor did counsel in either court, at any time, claim that the carrier was guilty of willfulness or wantonness. That claim was originated by the Court of Appeals of Lucas County.

Thompson's Commentaries on the Law of Negligence, White's Supplement, Sec. 22.

"Wanton or willful negligence is defined as such a gross want of care and regard for the rights of others as to imply a disregard of consequences or a willingness to inflict injury. The same idea is conveyed in an approved instruction to the effect that 'before a party can be said to be guilty of willful or wanton conduct, it must be shown that the person charged therewith was conscious of his conduct, and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury.' *The purpose to inflict willful injury does not exist when the result of the wrongful conduct may be reasonably attributed to mere negligence or inattention to duty.*"

White's Personal Injuries on Railroads, Sec. 14.

"To constitute wanton negligence it is essential that the act done or omitted must have been done or omitted with a present knowledge that injury would result therefrom, for without this consciousness the omission would be absence of care alone. *Hence it is, that a mere inadvertent failure to observe due care indicates mere negligence,* but a conscious failure to observe due care constitutes willfulness."

Shearman & Redfield, Vol. I, Sec. 114a, 6th Ed.

"That one may be chargeable with wanton or reckless conduct, showing a conscious indifference to the consequences to others, equivalent to well intent, he must have realized the peril to another, or that such conduct was likely or would probably place him in such danger as he could not rescue himself from "

Stewart v. Railroad Co., 32 Iowa, 561.

Pg. 563. "A willful act is an obstinate, stubborn, perverse act, and an act done willfully is one done stubbornly, by design, with a set purpose." (See also *Lee v. Rd.,* 66 Iowa, 131).

Fluckey et al. v. Southern Ry. Co., 242 Fed., 468.

"Gross and wanton negligence of a railway company, to avoid the contributory negligence of a person struck by a railway motor car, must be really willful or so highly reckless as to con stitute the equivalent of willfulness."

Railway v. Miller, 149 Ind., 490.

Pg. 502. "Negligence in a case, whether it be in a degree that may be termed slight, ordinary, or gross, is nevertheless negligence still; and when willfulness is the essential element in the act or conduct of the party charged with the wrong, the case ceases to be one of negligence.

"Willfulness and negligence are the opposites of each other; the former signifying the presence of intention, and the latter its absence."

Pg. 509. "The jury, by this finding, expressly attribute the death of the deceased to the negligent act of the fireman in omitting to give any signals, and, while this act of omission on the part of the employes in control of the engine may be said to be negligence *per se*, still *it was but an act of nonfeasance, and not one of aggressive character, and cannot establish the willful or intentional killing as alleged in the complaint.* For, as heretofore asserted, when willfulness is the element in the act or conduct of the party charged, the case ceases to be one of negligence. There can be no middle ground between willfulness and negligence, for, as we have seen, the authorities affirm that each of these elements is the opposite of the other. Consequently, when the facts in a given case show that the injury of which the plaintiff complains is the result of the negligent act or conduct of the defendant, then the fact that such negligence may be said to be of such a degree as to be considered 'gross negligence' cannot support a charge that the injury was willful or intentionally inflicted by the party accused."

King v. Railroad, 114 Fed., 855 (C. C. A., 5th Cir.)

Syl. 2. "Where a man, just after stepping on a railroad track in the yards, was run over by part of a freight train backing at the rate of about eight miles per hour, while the conductor, who was on the rear car, was looking in the opposite direction to see if a switch was properly turned for a passing train, and none of the trainmen saw the man on the track, there was no such wanton recklessness or gross negligence as would render unavailable a plea of contributory negligence."

Fluckey et al. v. Southern Ry. Co., 242 Fed., 468 (C. C. A., 6th Cir.)

Pgs. 470, 471. "The plaintiff here does not claim any evidence tending to show an intention on the part of the motorman to injure the plaintiff nor any actual willfulness. She seeks to build up a constructive willfullness through the cumulative effect of the violation of city ordinances. One ordinance required gates or flagmen at all railroad crossings within the corporate limits; this crossing had neither. Another forbade that railroad cars should be left standing within 150 feet of the highway crossing, so that they would obstruct the view down the track; a car was standing within that distance. A third ordinance (as we assume for the purpose of this opinion), limited to six miles per hour the rate of speed of all trains or cars within the city limits: this motor car was moving at a higher speed.

* * * * * * * * * *

"No one claims, however, that the violation

of a single ordinance is even evidence of wanton or willful negligence; and, indeed, no reason is suggested upon which such a claim could have been based.

"Plaintiff's position is that the simultaneous violation of three city ordinances indicates a degree of indifference or recklessness which should have the same effect as deliberate willfulness. We cannot think that this inference is permissible, merely from this basis and regardless of the character of the ordinance or the nature of the violation. If the breaking of one ordinance is not of itself at all indicative of willfulness, the multiplication of such instances cannot create a basis of inference otherwise non-existent.

"* * * * in cases like the present, the intent to run over a traveler upon the highway has no connection with the intent not to observe the ordinances, and the utmost that can be established by the breach of several ordinances is a general indifference to the observance of municipal regulations. Between this inference and the other one, there is no bridge; and the case is one for the application of the arithmetical rule that the addition of nothing to nothing cannot make something.

"A review of all the cases cited by plaintiffs develops that in each one wanton or willful negligence was inferred from the character of defendant's acts, and not primarily merely from the ordinance violations; and when we turn aside from the theory that the breach of three ordinances in gross inherently tends to show wantonness, and consider the nature and effect of the breaches here involved, we get the same result. There had been no municipal determination that this particular crossing needed gates

or a flagman; the ordinance was equally imperative as to every crossing in the city; and we must take notice of the vast number of such crossings within the corporation limits of every large city, where the degree of need for this precaution is not extreme."

Louisville & N. R. Co. v. Muscat & Lott, 41 So., 302.

Syl. 1. "The act of persons in charge of a railroad train in intentionally running it over a public street crossing in a city at a speed more rapidly than allowed by ordinance is not wanton or willful misconduct, unless the persons in charge had knowledge and were conscious that injury would probably result."

Railroad v. Mitchell, 134 Ala., 261.

Pg. 265. "The count alleges, that 'defendant through its servant or agent in charge of control of said locomotive engine, wantonly or intentionally caused the death of plaintiff's intestate in the manner following, viz: said servant or agent, with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad in said town or village of Elmore, and would be in great peril of their lives from the rapid running of said engine through said town or village, without proper and sufficient warning or notice of the approach of said engine, wantonly or intentionally ran said engine through said town or village with great rapidity and without proper or sufficient warning or notice of the approach of said engine, and as a proximate consequence thereof, said engine ran upon or against plaintiff's said

intestate in said town or village, and so injured him that he died.' "

Pgs. 265, 266. "Stripped of all unnecessary verbiage, the wanton or intentional act set up in this count is, that the engineer 'wantonly or intentionally ran said engine through said town or village, with great rapidity and without sufficient warning or notice of the approach of the engine,' with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad—as a proximate consequence of which wanton or intentional act of running the engine rapidly, without proper or sufficient warning, the deceased was killed. This was not an averment of an intention to injure the intestate, and, therefore, is not the equivalent of willfulness; nor is it an averment of a reckless disregard as to probable consequences, such as would make it wantonness on the part of the engineer."

Railway v. Fisk, 159 Fed., 373.

Pg. 377. "In reference to liability for injury to a trespasser, the doctrine is settled in this jurisdiction at least, that it arises only for injuries wantonly inflicted, which involves timely discovery and willful disregard of the danger in running the trespasser down—criminal conduct, and not negligence, in any sense of the term."

It is apparent that when on account of the fog the engineer did not see the signals, or disregarded them, he was not under the definitions, guilty of negligence which was willful and wanton. It was not a conscious failure to observe due care. This omission of duty,

even though constituting negligence, did not amount to wantonness or willfulness. And there is no evidence of willfulness or wantonness in the record.

Only Gross Negligence Pleaded.

The petition complained of gross negligence, to-wit: "the engineer of the second section * * * * was grossly negligent and careless in that he did not look for, see or observe the danger signals which were displayed." The answer denies this and also alleges "that those in charge of the second section * * * were unable to, and did not see the so-called "Block signals," for the reason that said signals were at said time, covered by a sheet of fog, so that they could not, and were not observed by the engineer in charge of said second section.

There are no allegations in the pleadings nor does the proof show willfulness or wantonness. Surely the cause of action upon which a plaintiff is to recover must be pleaded, as well as supported by the evidence. There being no willful or wanton negligence pleaded, no recovery can be had therefor, even if such had been proved.

> Gentry vs. U. S., 101 Fed., 51 (C. C. A. 8th Cir.)
>
> "One may not bring a suit for one cause of action, and recover judgment for another. A court can consider only what is in issue under the pleadings. Averments without proofs, and

proofs without averments, are unavailing. The judgment may not go beyond a determination of the issues presented by the pleadings, nor beyond the scope and object of the prayers they contain. These are axioms in the law of pleading and practice. They rest upon the basic principles of one jurisprudence, that no man shall be deprived of his life, liberty and property without due process of law; and due process of law must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which gives notice of the issue to be determined, which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial."

In re Rosser, 101 Fed., 562.

Page 568: "It is an axiom of pleading and practice that one may not bring a suit for one cause of action and recover a judgment for another, much less may one recover an order or judgment for money and property without any suit or notice of the claim upon which it is founded."

* * * * * * * * * *

"Such a proceeding lacks every element of due process of law."

In re Wood and Henderson, 210 U. S., 246.

Page 254: "The course of legal proceedings necessary to be had to affect private rights is well stated by Judge Sanborn in Rosser's Case, cited. He says at page 159, Am. Bankr. R. and page 567, 101 Fed. Rep.: 'Such a course must be appropriate to the case, and just to the party affected. It must give him notice of the charge

> or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.' "

No Basis for State Court's Decision.

The respondent having started from Toledo, in the State of Ohio, to Pittsburgh, in the State of Pennsylvania, was upon an interstate journey. The Court of Appeals so found. At the commencement of his journey, he had been supplied with the means of traveling upon free passes from Toledo to Pittsburgh, the purpose of his journey being to attend his mother's funeral. These passes were gratuitous, but the majority of the Court of Appeals found to the contrary.

That court, as indicated above, also denied the asserted Federal rights on a basis of fact having no support in the record, when it rendered judgment against petitioner upon the evidence set forth in the record in this case.

Postal Telegraph Cable Co. vs. Newport, 247 U. S., 464.

> Page 473: "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error."

CONCLUSION.

In conclusion petitioner respectfully submits that it has demonstrated errors of the Court of Appeals of Lucas County, Ohio, that the judgment of the Court of Appeals is in derogation of, and against, your petitioner's title, right, privilege and immunity especially set up and claimed under the Constitution, Act to Regulate Commerce, and the common law rules as accepted and applied in Federal tribunals, and therefore petitioner submits that the judgment of the Court of Appeals of Lucas County, Ohio, should be reversed and petitioner should be awarded all costs.

DOYLE & LEWIS,
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OPINION OF COURT OF APPEALS, LUCAS COUNTY, OHIO.

THE NEW YORK CENTRAL RAILROAD COMPANY,

vs.

WILBUR H. MOHNEY.

Error to the Court of Common Pleas.

KINKADE, J. This is a proceeding in error to reverse a judgment recovered by Mohney against the Railroad Company for injuries sustained, as he claimed, through the negligence of the Company when he was riding upon one of the Company's trains as a passenger.

Mohney was in the employ of the Railroad Company in the capacity of fireman. He had been in the employ of the Company about six years and had taken his examination for a position as engineer, had passed the examination successfully, but had not yet been assigned to employment as an engineer. At the time of his injury, Mohney was riding upon an annual pass that had been issued to him by the Company, entitling him to ride over the Company's line of railroad on all trains except seven, which were enumerated on the back of the pass. between the stations of Air Line Junction near Toledo and Collinwood, near Cleveland. The injury to Mohney occurred near the town of Amherst, between Cleveland and Toledo. The pass held by Mohney, on its face, read as follows:

"NEW YORK CENTRAL RAILROAD COMPANY
1916 West of Buffalo D O 944
Pass W. H. Mohney—
Account Engineer
Between Collinwood—Air Line Jct.
Toledo Division
Until December 31, 1916
Unless otherwise ordered
and subject to conditions
on back.
Valid when countersigned by W. F. Schaff or J. H. Turner.
Countersigned, J. H. Turner.
D. C. MOON,
General Manager."

The matter on the back of the pass read as follows:

"Not good on Main Line 6, 19, 22, 25 or 26, or 21 and 43 on Toledo Division.

CONDITIONS

In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the Company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the Company as a Common Carrier, or liable to him or her as such.

And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free trans-

portation, and that the pass will be lawfully used.

If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.

I AGREE TO THE ABOVE CONDITIONS.

W. H. MOHNEY
To be signed in ink."

Mohney, at the time the pass was issued to him, signed his name on the back of the pass as appears above.

At the time of the injury to Mohney he was not riding upon his pass in furtherance of the performance of any duty which he owed to the Railroad Company but was on a journey from Toledo to Pittsburgh, Pennsylvania, for the purpose of attending the funeral of his mother that was to be held near Pittsburgh. The accident that resulted in injury to Mohney was caused by the second section of a passenger train colliding with the first section near the town of Amherst. Mohney was on the first section in a passenger car and was very severely injured.

The case was tried in the Court of Common Pleas upon a stipulation entered into between the parties, which embraced most of the essential facts in the case and included in this stipulation was the amount of damage that Mohney sustained in case he should be found entitled to recover, to-wit: $9,750.00, and the judgment that was entered in his favor was for this amount thus fixed in the stipulation. In addition to the stipulation,

Mohney testified in his own behalf and in the course of his testimony detailed what was said to him by the representative of the Railroad Company, with whom he arranged his employment, concerning the pass that was to be issued to him and also stated the incidents connected with the trip that he was making from Toledo to Pittsburgh as stated. In addition to this testimony of Mohney, it was agreed between counsel for the plaintiff and the defendant that if D. C. Moon, who was the General Manager of the New York Central Railroad Company, in charge of the Division on which the accident occurred, were called as a witness to testify in the case, he would say that the accident was caused by the engineer of the second section of the train disregarding a cautionary signal stationed some eight thousand feet distant from the scene of the collision and disregarding also a stop signal located three thousand feet distant from the point of the collision.

Mohney intended to reach his destination in Pennsylvania by riding on his pass from Toledo to Cleveland, paying his fare from Cleveland to Youngstown and riding between those points on the same train on which he traveled from Toledo to Cleveland, and then continue his journey from Youngstown to Pennsylvania over the line of the Pittsburgh & Lake Erie Railroad Company, over which his employer, the New York Central Railroad Company, had procured for him a pass from Youngstown to Pittsburgh and return. The train upon which Mohney left Toledo, with the exception perhaps of one car to be cut out at Cleveland, was

a train running through from Toledo to Pittsburgh, and Mohney could have gone to Pittsburgh on this train. Mohney intended not to continue his journey from Youngstown to Pittsburgh on this train for the reason that he desired to get certain information from a relative living near Pittsburgh, by telephone from Youngstown before leaving Youngstown, and for the additional reason that the train from Toledo did not stop at a station near Pittsburgh at which Mohney believed he would desire to leave the train. The pass that Mohney was to ride on from Youngstown to Pittsburgh had been left for him at the station of the Pittsburgh & Lake Erie Company in Youngstown. He had determined that if he went through from Toledo to Pittsburgh on the same train, which by the way, ran over the line of the Pittsburgh & Lake Erie from Youngstown to Pittsburgh, he would arrive in Pittsburgh at such time as that he would have several hours there to wait before he could reach the station nearby to which he wished to go and on another road. The considerations which I have enumerated, induced Mohney to determine that he would leave the train on which he started from Toledo, at Youngstown, remain there for a few hours, attend to his telephoning, pick up the pass that was awaiting him there and then take another train later in the day for Pittsburgh, which was scheduled to stop at the station where he believed he would want to alight to meet his convenience with respect to attending the funeral in question.

On the trip in question, Mohney presented his pass to the conductor of the first section of the train and the pass was accepted as entitling him to ride between Toledo and Cleveland.

The case was submitted to the trial court, a jury being waived, on the stipulation and the testimony to which I have referred. The trial court found that Mohney was an intra-state pasenger; that he was travelling upon a pass that had been issued to him in part pay for services that he was to render for the company; that the injury that had been inflicted upon Mohney was caused by the gross negligence of the Railroad Company, and that the conditions on the back of the pass, relieving the Railroad Company from liability for negligence, were contrary to public policy, were invalid and afforded no defense to the claim of Mohney for damages, and, as stated, judgment was entered accordingly.

Several grounds of error are assigned as demanding the reversal of this judgment. The principal questions insisted upon in this case are:

First: That the finding of the Court that Mohney was an intra-state passenger was not sustained by the evidence, the claim of railroad company's counsel being that the evidence before the trial court, the stipulation and the testimony referred to, showed conclusively that Mohney, at the time of his injury, was upon an interstate journey.

Second: Counsel for the Railroad Company insist that Mohney at the time of his injury was a passenger being carried as a gratuity and that the annual

pass issued to him was a gratuity in every sense and was in no wise compensated for by his services.

Third: That the conditions and release on the back of the pass signed by Mohney, was a valid undertaking between him and the Railroad Company and a complete defense to the cause of action asserted in this case.

Counsel for Mohney insists that the findings and judgment of the trial court are all sustained by the evidence on which the case was submitted.

The case has been very fully argued both in brief and orally and this Court has devoted an unusual amount of time to the examination of the questions raised and the authorities cited as well as numerous authorities not cited by counsel. Any attempt to review in detail the numerous authorities touching the different positions of counsel and the questions involved in this case, we think would serve no useful purpose. The fact is, there is quite a marked difference between the holdings of the Federal Courts with respect to what does and what does not constitute a violation of public policy, with respect to contracts of this kind and the decisions of many of the State courts upon the same subject. The decisions of the Courts of the different States are by no means in harmony upon this subject.

It should be mentioned here that at some time in connection with his employment, the precise time is not stated by Mohney, he made no inquiry about having a rate book, showing the scale of wages of employees of his class, and a pass and at the time of this inquiry the

official of whom he made the inquiry gave him the rate book and answered that passes were not issued until after the employee had been in the service of the Company for six months. We think the language used by Mohney was intended to mean, if it does not state it with entire accuracy, that this conversation took place before he began his work. At that time, at least so far as Mohney was concerned, the passes that were issued to him were first quarterly and later semi-annually and later still, annually. For about six years prior to the time of his accident he had possessed and use the pass of the Company in substantially the same form as the one copied in this opinion and for the last two or three years at least, the pass had been given to him annually.

We think it is proper to consider the facts attending the issuing of the passes to Mohney, as testified to by him and the conduct of the railroad Company in issuing these various passes to Mohney covering the entire time of his employment, excepting the first six months, and a majority of the Court are of the opinion that this conduct of the Company is an important circumstance in determining whether the passes were issued in consideration of his employment, and, when taken in connection with the testimony showing what was said by the parties, is sufficient to sustain the finding of the trial court that the pass in question was in fact issued in consideration of his employment.

The following authorities seem to sustain this position:

Doyle, Admr. v. Fitchburg Railroad Co., 166 Mass. 492.
Dugan vs. Blue Hill Street Ry. Co., 193 Mass. 431.
Eberts vs. Railway Company, 151 Mich. 250
Williams vs. Railroad Co., 17 Utah 210; 72 Am. St. Rep. 777.
Walther vs. Southern Pacific Co., 159 Cal. 769. This case is also reported in 37 L. R. A. (N. S.) 235, where it is fully annotated.
10 Corpus Juris, 632, and following pages.
Whitney vs. Railroad Co., 102 Federal Rep. 850.
Tripp vs. Michigan Central R. R. Co., 238 Federal Rep. 449, 458.

I would be very glad to concur in the position taken by the other members of the Court that Mohney's pass was issued to him in part consideration of his services and I would have no difficulty in doing so were it not for the decision of the Supreme Court of the United States in the case of *Charleston & Western Carolina Railway Company vs. Thompson,* 234 U. S. 576.

While it is true that in the case of *Railway vs. Thompson* last cited, the pass had been issued to a member of the employee's family, one which the Supreme Court said the railroad company was under no obligation to issue, and was a trip pass between a point in one state and a point in another state, and the opinion of

the Court must be read with reference to the particular case that the Court was deciding, nevertheless speaking for myself alone, it seems to me that the language of Justice Holmes in the opinion is sufficiently broad in scope to clearly indicate that that Court would hold, if the question were before them, that a pass issued to an employee under circumstances like those attending the issue of the pass in the case at bar, was a free pass and not issued in any sense in consideration, to any extent, of the services to be rendered by him. It is on this account, and this account alone, that I find myself constrained to differ from my associates on the question stated. It is a fact that since the decision of *Railway vs. Thompson*, the question has again been before the Supreme Court of the United States with respect to a contract relieving the railroad company from liability for negligence under a pass issued to a drover, one travelling upon a train accompanying a shipment of live stock, in the case of *Norfolk Southern Railroad Company vs. Chatman*, 244 U. S. 276. In that case Mr. Justice Clarke, who delivered the opinion of the Court, reviewed extensively the various Federal decisions with respect to contracts limiting liability of the character in question, insofar as they apply to passes issued to drovers and distinguishes the case from the case of *Railroad vs. Thompson*, 234 U. S. 576, cited. After considering the very comprehensive, interesting and illuminating opinion by Justice Clarke, it still seems to me that the opinion in the case of *Railroad vs. Thompson* has the scope that I have mentioned.

This Court is unanimously of the opinion that the finding of the Court of Common Pleas, that the accident in this case was the result of gross negligence on the part of the railroad company is abundantly sustained by the evidence before the trial court. The trial judge evidently gave full credit to the testimony which it was stipulated the General Manager of the Railroad Company would give if called as a witness and by virtue of the language of that stipulation, we think the trial court might well have characterized the negligence involved in stronger terms. In fact, we are clearly of the opinion that the negligence in this case, under the evidence, was willful and wanton. Signals upon railroads, cautionary and stop signals, are indeed of little moment with respect to the safety of passengers travelling thereon if the engineer, whose duty it is to observe and heed them, may "disregard" them and that is precisely what the stipulation says the General Manager, Mr. Moon, would have testified to had he been called as a witness, was done by the engineer and there is nothing in the record to either modify or contradict this in any respect.

We think the decisions throughout the country, State as well as Federal, are practically unanimous to the effect that a contract relieving the railroad company from the results of negligence of the character which I have mentioned, are clearly against public policy and void, and this is true whether the passenger is one who is being carried gratuitously or whether he is riding on

a pass that has been issued for a consideration. If the case rested upon this ground alone and we were to hold that Mohney's pass was not issued in part consideration for his services, but was a gratuity pure and simple, we would have no hesitancy in reaching the conclusion that the judgment of the Court of Common Pleas should be affirmed.

The authorities, both State and Federal, are practically unanimous in holding that where the pass is issued for a consideration, a contract relieving the railroad company from liability for negligence resulting in injury to a passenger using the pass, is void as against public policy.

The language of the Federal Statute, the Hepburn Act, and the language of the Ohio Statute, Section 516 of the General Code, with respect to the list of persons to whom passes may be issued are practically identical.

The members of this Court are unanimous in the opinion that Mohney, although riding upon a pass that was good between two stations, to-wit: Air Line Junction and Collinwood, both located in the State of Ohio, was nevertheless, at the time of his injury travelling upon an interstate journey and was not an intra-state passenger as claimed by counsel for Mohney and as found by the trial court.

In view of the opinion of the majority of the Court that Mohney's pass was issued for a consideration as stated, and the opinion of all the members of the Court that the negligence was willful and wanton, we might pass as immaterial the question whether it was an inter-

state or intra-state journey that Mohney was making but counsel both in oral argument and in brief, have extensively argued this question and we have given it a very great deal of attention and we have no hesitancy in expressing our opinion upon the question, although we deem it unnecessary to a decision of the case.

In addition to the authorities hereinbefore cited, sustaining the proposition that a pass in this case was issued for a consideration, we cite the following cases as sustaining the conclusions we have reached:

Railroad Co. vs. Curran, 19 O. S. 1.
Knowlton vs. Railway Co., 19 O. S. 260.
Railway Co. vs. Kinney, 95 O. S. 64.
Railroad Co. vs. Lockwood, 17 Wallace's Rep. 357.
Coe vs. Errol, 116 U. S. 517.
Railway Co. vs. Voight, 176 U. S. 498.
Railway Co. vs. Adams, 192 U. S. 440.
Boering vs. Railway Co., 193 U. S. 442.
Railway Co. vs. Texas, 204 U. S. 403-413.
Railroad Commission of Ohio vs. Worthington, Receiver, 225 U. S. 101.
Southern Pacific Terminal Co. vs. Interstate Commerce Commission & Young, Young vs. Interstate Commerce Comimssion et al, 219 U. S. 498.
Railroad Co. vs. Sabine Tram. Co., 227 U. S. 111.
Southern Pacific Co. vs. Schuyler, 227 U. S. 601.
Railroad Co. vs. Thompson, 234 U. S. 576.

Robinson vs. Railroad Co., 237 U. S. 84.
Railroad Co. vs. Chatman, 244 U. S. 276.
White vs. Railway Co., 86 Southwestern Reporter, 962.

An examination of the cases to which I have called attention will clearly indicate that no general rule can safely be laid down applicable to cases generally determining what is and what is not an interstate transportation of passengers. Each case must rest upon its own attendant facts and all that we have said in this opinion relates distinctly, of course, to the case at bar and is in no sense to be read as an attempt to lay down general rules.

The judgment of the Court of Common Pleas will be affirmed.

CHITTENDEN AND RICHARDS, JJ., *concur.*